ATTORNEY FOR APPELLANT:

PATRICIA CARESS MCMATH
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

KARL M. SCHARNBERG
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DEWAYNE CALVIN HIGDON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 90A02-0710-CR-913
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WELLS SUPERIOR COURT
The Honorable David L. Hanselman, Sr., Special Judge
Cause No. 90D01-0212-FC-16

July 25, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

DeWayne Calvin Higdon ("Higdon") appeals his convictions of Dealing in Marijuana, as Class C felonies.[1] We affirm.

Issues

Higdon raises three issues, which we consolidate and restate as:

I. Whether the trial court committed fundamental error in admitting a law enforcement officer's testimony regarding a confidential informant; and

II. Whether the trial court abused its discretion in admitting evidence or rebuttal testimony.

Facts and Procedural History

T.S. admitted to police that he possessed marijuana. He later agreed to serve as a confidential informant. On July 5 and 11, 2002, T.S. wore an audio transmitting device and purchased marijuana from Higdon, while Bluffton Police Department Detective Terri Bricker ("Detective Bricker") monitored their conversation. During the transactions, Detective Bricker recognized the voices of Higdon, T.S., and Higdon's roommate Keith Archbold. Afterward, T.S. delivered the marijuana to Detective Bricker and reported that he had purchased it from Higdon.

Higdon was charged with two counts of Dealing in Marijuana. The jury found him guilty as charged, and the trial court entered judgments of conviction. He now appeals.

Discussion and Decision

I. Fundamental Error

Higdon argues that the trial court committed fundamental error in admitting Detective

Bricker's testimony regarding T.S.'s credibility. Where a criminal defendant fails to object to the admission of evidence, he waives appellate review of the admission of the challenged evidence, unless he can establish fundamental error. Rhodes v. State, 771 N.E.2d 1246, 1256 (Ind. Ct. App. 2002), trans. denied.

> Appellate courts may, on rare occasions, resort to the fundamental error exception to address on direct appeal an otherwise procedurally defaulted claim. But fundamental error is extremely narrow and available only when the record reveals a clearly blatant violation of basic and elementary principles, where the harm or potential for harm cannot be denied, and which violation is so prejudicial to the rights of the defendant as to make a fair trial impossible.

Jewell v. State, 887 N.E.2d 939, 942 (Ind. 2008).

Detective Bricker, the first witness at trial, described how she would use confidential informants to assist in performing controlled buys of illegal substances. She identified T.S. as the confidential informant she had used in this case. The State asked,

> Q: How did [T.S.] come to you then?
>
> A: . . . A report had come in that an officer had been sent to [T.S.]'s house on the possibility of an underage drinking party. The officer wrote a report, he went down to the house, he didn't find that there was anyone that had been underage and drinking there or anybody else that had been using drugs. The officer asked [T.S.] if he had been smoking marijuana and [T.S.] told him that he had earlier in the day. The officer asked him if he had any more and [T.S.] said "yes" and went and got it and gave it to the officer. It was a very small amount. The officer wrote a report and turned the evidence in and no charges were filed. So I, seeing that he was a fairly honest person, I called [T.S.] and had him come in and talk to me and asked him if he would be interested in working as an informant.

Transcript at 291-92 (emphasis added). Higdon did not object.

On appeal, Higdon challenges Detective Bricker's testimony that T.S. "was a fairly

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[1] Ind. Code § 35-48-4-10.

honest person." Id. at 292. "Witnesses may not testify to . . . whether a witness has testified truthfully." Ind. Evidence Rule 704(b); see also Shepherd v. State, 538 N.E.2d 242, 243 (Ind. 1989). However, this rule does not apply here. Detective Bricker was not testifying to whether T.S. had testified truthfully – he had not yet testified at trial. Instead, she was explaining why she had been willing to use T.S. as a confidential informant. See Angleton v. State, 686 N.E.2d 803, 812 (Ind. 1997) (holding that officer's testimony that a burglary had not occurred did not constitute "an attack on [or support of] the truthfulness of any other statements"). Accordingly, the testimony was admissible. Even if it was inadmissible, however, it would not rise to the level of fundamental error.

II. Abuse of Discretion

Higdon challenges the admission of two exhibits and rebuttal testimony. "Rulings on the admission of evidence are subject to appellate review for abuse of discretion." McHenry v. State, 820 N.E.2d 124, 128 (Ind. 2005).

A. Chain of Custody

Higdon argues that the trial court abused its discretion in admitting State's Exhibits Six and Eight, the marijuana T.S. purchased on July 5 and 11. Specifically, Higdon challenges the lack of foundation for the exhibits at the time they were admitted.

Detective Bricker, the State's first witness, testified regarding the chain of custody of the marijuana while it was in her control. During her testimony, Exhibits Six and Eight were admitted over Higdon's objection that the State's chain of custody was "inadequate." Supplemental Appendix at 15. "[A]n adequate foundation is laid when the continuous

whereabouts of an exhibit is shown from the time it came into the possession of the police." Espinoza v. State, 859 N.E.2d 375, 382 (Ind. Ct. App. 2006).

> To establish a proper chain of custody, the State must give reasonable assurances that the evidence remained in an undisturbed condition. However, the State need not establish a perfect chain of custody, and once the State "strongly suggests" the exact whereabouts of the evidence, any gaps go to the weight of the evidence and not to admissibility. Moreover, there is a presumption of regularity in the handling of evidence by officers, and there is a presumption that officers exercise due care in handling their duties. To mount a successful challenge to the chain of custody, one must present evidence that does more than raise a mere possibility that the evidence may have been tampered with.

Id. (citing Troxell v. State, 778 N.E.2d 811, 814 (Ind. 2002)).

Higdon's argument begins and ends with the fact that Detective Bricker testified to her control of the marijuana, but not to the chain of custody while the exhibits were at the Indiana State Police Laboratory. As noted by the Troxell Court, however, any gaps go to the weight, not the admissibility, of the exhibit. Therefore, Exhibits Six and Eight were admissible, even based solely upon Detective Bricker's testimony. Furthermore, Troy Ballard, the Indiana State Police Laboratory's Drug Chemist Supervisor, later testified that all procedural safeguards had been followed in this case. His testimony filled the gap that was the basis of Higdon's objection. The trial court did not abuse its discretion in admitting these exhibits.

B. Rebuttal Evidence

Finally, Higdon asserts that the trial court abused its discretion in admitting evidence the State offered on rebuttal. Rebuttal evidence is that which "tends to explain, contradict, or disprove an adversary's evidence." Morgen v. Ford Motor Co., 797 N.E.2d 1146, 1152 (Ind.

2003). Like other evidence, we review the admission of rebuttal evidence for an abuse of discretion. Id.

After the State's case-in-chief, Higdon offered the testimony of four people who stated that Higdon did not sell marijuana to T.S. In rebuttal, the State called Beverly Steffen and Suzanne Hall. Steffen testified that her daughter had worked for Higdon and that Steffen had exchanged emails (Exhibit 13) with Higdon regarding her daughter's testimony in this case. Exhibit Thirteen included three email messages dated March 17, 2007, the day after the trial court denied Higdon's Motion for Change of Judge. At 10:15 a.m., Higdon sought confirmation that Steffen's daughter had received a subpoena. At 12:45 p.m., Steffen responded affirmatively and indicated that the matter scared her daughter. At 4:44 p.m., Higdon advised that Steffen's daughter should call Hall, the State's other rebuttal witness. He wrote, "this is where [T.S.] came into the store in July 200[2] and told me to give him $10,000 so he could take an extended vacation." Exhibit 13. Meanwhile, Hall testified that Higdon called her the day after she had received a subpoena in the case. "[H]e wanted me to come in and . . . he said all it was was that I had witnessed something about [T.S.] coming into the store and trying to extort $10,000 of money from him." Tr. at 519. Hall told Higdon that she had "never met this person." Id. She reiterated that it did not happen.

Challenging the admission of Exhibit 13 and the testimony of Steffen and Hall, Higdon argues that they were irrelevant, they were evidence of Higdon's character, they attacked the credibility of Higdon's four witnesses with a specific instance, and they did not constitute rebuttal evidence. Our Supreme Court addressed a similar issue in Music v. State,

448 N.E.2d 1082, 1086 (Ind. 1983). After presentation of Music's case, a witness for the State testified on rebuttal that Music had asked her to testify falsely regarding his whereabouts at the time of the crime. The Music Court analyzed admission of the testimony as follows:

> Defendant's statement to the witness circumstantially evidenced a consciousness of guilt. Given the contents, . . . it inferentially constituted an attempt to create or manufacture a false alibi for the event. It was therefore, relevant and material. . . . Finally, although Defendant seemingly conceded at trial that this testimony was admissible in the State's case in chief, he vehemently challenged the State's assertion that it rebutted the alibi defense.

Id. The Music Court held that any irregularity in when the State offered the testimony "will not be treated as reversible error unless under the circumstances the appellant was prevented from presenting rebuttal evidence thereto."[2] Id.

Thus, the challenged evidence was admissible to show Higdon's consciousness of guilt. Moreover, the timing of the State's offer was not reversible error because Higdon declined the opportunity to present surrebuttal testimony. Tr. at 531. The trial court did not abuse its discretion in admitting the evidence the State offered on rebuttal.

Conclusion

The police officer's statement about a confidential informant was not fundamental error. The trial court did not abuse its discretion in admitting exhibits or in admitting the State's rebuttal evidence.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.

[2] Higdon fails to address, in either of his briefs, the holding in Music v. State, 448 N.E.2d 1082, 1086 (Ind. 1983).